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UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:)	AWA Docket No. 11-0222
)	
Tri-State Zoological Park of Western)	
Maryland, Inc., a Maryland corporation;)	
and Robert L. Candy, an individual,)	
)	
Respondents)	Decision and Order

PROCEDURAL HISTORY

On May 11, 2011, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this proceeding by filing a Complaint. The Administrator instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued pursuant to the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Administrator alleges, on or about May 17, 2006, September 7, 2006, November 29, 2006, May 23, 2007, September 26, 2007, June 2, 2008, September 3, 2008, August 3, 2009, September 30, 2009, November 20, 2009, May 19, 2010, and

September 29, 2010, Tri-State Zoological Park of Western Maryland, Inc. [hereinafter Tri-State], and Robert L. Candy violated the Regulations.¹ On June 3, 2011, Tri-State and Mr. Candy filed an answer denying the material allegations of the Complaint.

On February 8-9, 2012, Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] conducted a hearing in Hagerstown, Maryland. Mr. Candy appeared pro se and on behalf of Tri-State. Buren Kidd and Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. At the hearing, the ALJ received in evidence the Administrator's exhibits identified as CX 1 through CX 16, with the exception of CX 3 at 4 and CX 10 at 9-12, which the Administrator withdrew (Tr. at 21-24).² The ALJ also excluded portions of CX 16 (Tr. at 434-35). The ALJ received in evidence Tri-State and Mr. Candy's exhibits identified as RX 1 through RX 23, with the exception of RX 12 and RX 14, which Tri-State and Mr. Candy withdrew, and RX 13, which the ALJ excluded (Tr. at 743-46). In addition, the parties entered into stipulations regarding the admissibility and authenticity of much of the documentary evidence, which the ALJ received in evidence as ALJX 1 (Tr. at 9).

On August 1, 2012, after the parties filed post-hearing briefs, the ALJ issued a Decision and Order in which the ALJ: (1) concluded Tri-State and Mr. Candy willfully

¹Compl. at 2-9 ¶¶ 4-26.

²References to the transcript of the February 8-9, 2012, hearing are identified as "Tr."

violated the Regulations as alleged in paragraphs 5a, 5b, 5d, 5e, 6, 7, 8a, 8d, 8e, 9a, 9b, 9c, 11, 12a (with respect to a lion enclosure), 12b, 13, 14, 16a, 18, 20b, 20c, 20d, 20e, 21b (with respect to a lion enclosure), 22, 23a, 24a, 24b, 25, 26a, and 26c of the Complaint; (2) concluded the Administrator failed to prove by a preponderance of the evidence that Tri-State and Mr. Candy violated the Regulations as alleged in paragraphs 4, 5c, 5f, 8b, 8c, 10, 12a (with respect to a cougar enclosure), 15, 16b, 16c, 16d, 16e, 17a, 17b, 19, 20a, 20f, 21a, 21b (with respect to cougar and bobcat enclosures), 21c, 23b, 23c, and 26b of the Complaint; (3) ordered Tri-State and Mr. Candy to cease and desist from violating the Animal Welfare Act and the Regulations; and (4) suspended Tri-State's Animal Welfare Act license (Animal Welfare Act license number 51-C-0064) for a period of 45 days (ALJ's Decision and Order at 67-72).

On September 5, 2012, Tri-State and Mr. Candy appealed to the Judicial Officer. On October 26, 2012, the Administrator filed a response to Tri-State and Mr. Candy's appeal petition. On November 2, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I affirm the ALJ's Decision and Order.

DECISION

A. Admissions

Tri-State and Mr. Candy admit Tri-State is a Maryland corporation whose registered agent for service of process is Mr. Candy, whose mailing address is in Cumberland, Maryland. Mr. Candy was the chief executive officer, director, principal, and registered agent for Tri-State at all times relevant to this proceeding.

Tri-State and Mr. Candy further admit Tri-State operates as an “exhibitor” as that term is defined in the Animal Welfare Act and the Regulations and held Animal Welfare Act license number 51-C-0064 at all times relevant to this proceeding.

B. Summary of Factual History

Mr. Candy started Tri-State in 2002 as a way to provide his children and other members of the community in Cumberland, Maryland, with an entertaining and educational activity (Tr. at 693-97). Before starting the zoo, Mr. Candy spent 30 years as a management operations consultant, specializing in the fields of sanitation, housekeeping, building management, and environmental services (Tr. at 693). Mr. Candy wrote housekeeping and maintenance manuals and provided training in those disciplines and is experienced in construction (Tr. at 693-95). Mr. Candy also has experience operating businesses, and he managed a horse farm in Pennsylvania at one time (Tr. at 761-62).

During his years working for corporations and as a consultant, Mr. Candy traveled extensively and visited zoos. Mr. Candy started gathering information on owning and operating a zoo in the 1980s. (Tr. at 695.)

Tri-State is located on a defunct campsite, which Mr. Candy modified to house and exhibit Tri-State's animals (Tr. at 695-96). The site included a large building destroyed in a fire in March 2006 (Tr. at 763). Most of Tri-State's post-fire structures were constructed by volunteers from recycled materials (Tr. at 696-97). Tri-State has no employees, but approximately 20 volunteers perform specific duties at Tri-State commensurate with their experience and abilities (Tr. at 696).

Tri-State is still being developed and approximately five acres of the sixteen-acre site are used for zoo related purposes. Mr. Candy estimated that when construction is completed, Tri-State will occupy eight acres of the property. (Tr. at 698.) Mr. Candy explained that Tri-State operates as an animal rescue facility as much as it does a zoo (Tr. at 698-99). He estimated that 3,000 people come to Tri-State each year to see approximately 50 animals (Tr. at 699, 721).

Mr. Candy testified he does his best to comply with the Regulations, but has been told by Animal and Plant Health Inspection Service personnel that they cannot give him specific guidance when he has asked for assistance (Tr. at 700-01). Mr. Candy's inability to obtain guidance has posed problems for Mr. Candy, as he has been found non-compliant with some of his fences and cages, despite his requests to consult with an

Animal and Plant Health Inspection Service expert about the requirements for those structures (Tr. at 701-02). Tri-State and Mr. Candy have been responsive to criticism from the Animal and Plant Health Inspection Service and have immediately corrected some of the violations cited by the Animal and Plant Health Inspection Service (Tr. at 702-03).

Mr. Candy speculated that the biggest problem with the Tri-State facility is “aesthetics” (Tr. at 703-04). Mr. Candy stated that Tri-State does not always look pretty, especially in winter (Tr. at 704). Mr. Candy opens at 10:00 a.m. in the morning and closes in the winter at dusk (Tr. at 704-05). Volunteers follow a written schedule of tasks throughout the day (Tr. at 704). Mr. Candy alone feeds and handles the large cats (Tr. at 705).

Mr. Candy keeps information regarding training sessions he or his volunteers attend and Tri-State’s rules and regulations (Tr. at 714-18). His rules include instructions on cleaning areas occupied by the animals and rules for feeding the animals (Tr. at 718-20). Mr. Candy provides ongoing instruction to his volunteers during their tours of duty (Tr. at 719). Some volunteers live on the premise, which provides added security (Tr. at 727). Other than a “Big Cat Symposium” that he and volunteers attended in 2004 (Tr. at 714-15; RX 5), Mr. Candy and Tri-State volunteers have had no formal training in the care and keeping of exotic animals (Tr. at 710-12).

Tri-State gives educational tours to school and other groups, which Mr. Candy conducts on a daily basis (Tr. at 722). Mr. Candy encourages interaction with the animals, but does not allow direct contact with them (Tr. at 854-55). Mr. Candy explained that he conducts tours of Tri-State because the facility does not have many signs, and he is aware that it looks different from traditional zoos. Many of Tri-State's animals are rescued, and Mr. Candy wants visitors to understand Tri-State's mission and layout. (Tr. at 790.)

Dr. Gloria McFadden has been employed by the Animal Care Division, Animal and Plant Health Inspection Service, as a veterinary medical officer for approximately 8 years (Tr. at 31). Dr. McFadden's primary duties are to enforce the Animal Welfare Act and the Regulations at facilities she is assigned to inspect (Tr. at 33). Among her assigned facilities is the Tri-State facility, with which Dr. McFadden first became familiar in 2004 (Tr. at 34). During the period May 17, 2006, through September 29, 2010, Dr. McFadden conducted 12 inspections of the Tri-State facility and cited Tri-State and Mr. Candy for violations of the Animal Welfare Act and the Regulations during each inspection (CX 3-CX 14).

C. The Animal Welfare Act and the Regulations

The purpose of the Animal Welfare Act, as it relates to exhibited animals, is to ensure that the animals are provided humane care and treatment. 7 U.S.C. § 2131. The Secretary of Agriculture is authorized to promulgate regulations to govern the humane

handling, care, treatment, and transportation of animals. 7 U.S.C. §§ 2143(a), 2151. The Animal Welfare Act requires exhibitors to be licensed and requires the maintenance of records regarding the purchase, sale, transfer, and transportation of regulated animals. 7 U.S.C. §§ 2133-34, 2140. Exhibitors must also allow inspection by Animal and Plant Health Inspection Service employees to assure the provisions of the Animal Welfare Act and the Regulations are being followed. 7 U.S.C. § 2146(a); 9 C.F.R. § 2.126.

Violations of the Animal Welfare Act or the Regulations by licensees may result in the assessment of civil penalties, the issuance of cease and desist orders, and the suspension or revocation of Animal Welfare Act licenses. 7 U.S.C. § 2149.

Exhibitors are liable for violations of the Animal Welfare Act by agents or employees of the exhibitor, as follows:

§ 2139. Principal-agent relationship established

When construing or enforcing the provisions of this chapter, the act, omission, or failure of any person acting for or employed by . . . an exhibitor or a person licensed as . . . an exhibitor . . . within the scope of his employment or office, shall be deemed the act, omission, or failure of such . . . exhibitor . . . as well as of such person.

7 U.S.C. § 2139.

The Regulations provide requirements for licensing, recordkeeping, and veterinary care, as well as standards for the humane handling, care, treatment, and transportation of covered animals. The Regulations set forth specific requirements regarding facilities where animals are housed, feeding and watering of animals, and sanitation.

D. Tri-State and Mr. Candy's Violations

1. Handling of Animals

The Regulations require exhibitors to handle animals during public exhibition, as follows:

§ 2.131 Handling of animals.

....
(c)(1) During public exhibition, any animal must be handled so there is minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the animal and the general viewing public so as to assure the safety of animals and the public.

9 C.F.R. § 2.131(c)(1).

Lion and Tigers

During an inspection conducted on June 2, 2008, Dr. McFadden was accompanied by another Animal and Plant Health Inspection Service inspector, Robert Markmann (Tr. at 75, 361; CX 8). Volunteers for Tri-State were observed leading a group of people to see tigers and a lion in a "behind-the-scenes" tour (CX 8). Dr. McFadden noticed that the barrier between the public and the animals would have allowed people to touch the animals, though she did not observe anyone doing so (Tr. at 76-77). Dr. McFadden took pictures of two areas that showed people very close to the cats' enclosures (Tr. at 79-80; CX 8). No pictures show anyone touching the animals (Tr. at 249; CX 8). The lion was situated at a distance from the viewing public, with a wall-like structure between the animal and the tour participants (Tr. at 250).

Robert Markmann has been employed by the Animal and Plant Health Inspection Service since 1986 and has been an animal care inspector since 1988 (Tr. at 359). He observed members of the public viewing tigers and saw children touching the tigers by reaching through the bars of the tigers' cage (Tr. at 362). Mr. Markmann advised a Tri-State volunteer that the Animal and Plant Health Inspection Service did not allow the sort of exhibition that was underway and asked to speak to the owner (Tr. at 363). Dr. McFadden left to find Mr. Candy and bring him to the exhibition site. When Mr. Markmann told Mr. Candy that he could not allow the public to touch the tigers, Mr. Candy told Mr. Markmann that he encouraged contact by the public with the tigers to keep them friendly (Tr. at 365).

Mark Deatelhauser works as a corrections officer, but has volunteered at Tri-State since 2004. He does a little of everything at the zoo, helping with exhibitions and tours, feeding the animals, and cleaning up after the animals. (Tr. at 509.) Mr. Deatelhauser described how he and volunteers would bring groups to see the large cats in their housing behind the cages that are open to general public viewing (Tr. at 516-17). Usually at least two people from Tri-State are with the public during these special exhibitions (Tr. at 518). People are allowed to get close to the animals to take pictures, but they are instructed not to touch the animals (Tr. at 519).

Mr. Deatelhauser was taking a group on a tour of the back of the tiger area on June 2, 2008, when Animal and Plant Health Inspection Service inspectors were present

(Tr. at 510). He did not allow anyone on the tour to touch the tigers or to put their hands in tigers' cage. He was not involved with showing the lion to the group that day.

(Tr. at 511.) Mr. Deatelhauser was the only barrier between the public and the cats in their cage (Tr. at 517). He estimated that between 15 and 20 people were in the group on June 2, 2008, but he could not recall the exact number (Tr. at 515).

Mr. Deatelhauser had worked at Tri-State for 4 years on the date the inspectors observed him. At that time, he worked at his regular job from 4:00 p.m. to 12:00 a.m., so he helped at the Tri-State facility every morning from Monday through Friday.

Mr. Deatelhauser's training for his work at Tri-State was acquired on the job from Mr. Candy. (Tr. at 514, 520.) Mr. Candy taught him how to handle young animals, and he has worked with the tigers since they were born at the zoo (Tr. at 520-23).

Mr. Deatelhauser no longer handles the cats, but he does direct them to a "catch area" for feeding and cleaning their cages (Tr. at 521). Mr. Deatelhauser was instructed that if an animal escapes, he should do "whatever you can to keep the animal from getting away" (Tr. at 522). Mr. Deatelhauser no longer conducts many tours because he now works at his regular job during the day (Tr. at 522).

Kimberly Nicole Cramer has volunteered at Tri-State for 10 years (Tr. at 527). Her primary duties include helping to keep internet records, helping with tours, and working in the gift shop and ticket office (Tr. at 528). She leads school groups on tours, including areas of the zoo from which the public is otherwise restricted. She often works

with another volunteer to lead the tours, depending on the size of the group. The school tours generally include chaperones or parents of the children. (Tr. at 529-30.)

Ms. Cramer received all her training about Tri-State's animals while working as a volunteer (Tr. at 538-39).

Ms. Cramer instructs all visitors to keep their hands away from the animals, but she believes that the area where she usually stands with groups is too far from the fence containing the lion to allow people to put their hands near the animal. She believes she is a sufficient barrier between the animals and the tour group. (Tr. at 532.) She instructs people to keep their backs against the wall opposite to the lion's enclosure and their arms at their sides (Tr. at 544-45). She is particularly vigilant when children are present (Tr. at 541-43). When Ms. Cramer thinks that the lion would not be receptive to a crowd, she does not bring people to the area behind the lion enclosure (Tr. at 533).

Ms. Cramer was one of the volunteers leading a tour group on June 2, 2008, when Animal and Plant Health Inspection Service inspectors were at the zoo (Tr. at 536). Ms. Cramer testified that no one touched the lion or put their hands near the fence, which she estimated was 12 feet in distance from the lion (Tr. at 535-37).

Mr. Candy denied inviting the public to touch the tigers. He explained that Mr. Markmann misunderstood his concept of contact with the animals, by which Mr. Candy meant closer interaction with them (Tr. at 854). Mr. Candy explained that the area where people entered to observe the tigers close up was about 20 feet long and that

the number of people who could enter was controlled by the volunteer at the door, while another volunteer was inside the corridor with the tour (Tr. at 786-89).

Mr. Candy observed that, at the time of the inspection at issue, the tigers were young and had occupied their space for about 6 months. The tigers were housed in that area while their permanent enclosure was being prepared. (Tr. at 790-91.) Mr. Candy believed his staff was familiar with the temperaments of Tri-State's tigers (Tr. at 788). No one at Tri-State moves a cat unless Mr. Candy is there, and he has trained his staff to handle an animal escape by using fire extinguishers located throughout the facility (Tr. at 791-92).

Mr. Markmann testified that he saw children reach into the spaces in the fencing to touch the tigers, but Dr. McFadden did not observe children touching the animals. The evidence regarding whether people touched the tigers is in equipoise. Nonetheless, I find the Administrator has met his burden of proving that Tri-State and Mr. Candy failed to provide a sufficient barrier between the tigers and the public. The photographs depict close quarters, with Mr. Deatelhauser in front of the group in a narrow corridor and Ms. Cramer outside of the entrance to the corridor (CX 8). It is unlikely that Ms. Cramer could have seen what people did while they observed the tigers, and she was tasked with crowd control in the area next to the lion enclosure.

The volunteers assigned to conduct tours did not have sufficient control over the participants to prevent them from reaching into the tigers' cage. The quarters were too

cramped and the volunteers too far apart to provide an adequate barrier between the crowd and the animals. Neither volunteer had a good view of everyone on the tour once the tour entered the area behind the tiger cages. People were too far from Ms. Cramer once they were behind the tiger cage, and Mr. Deatelhauser did not stand between all of the tour participants and the cage. Mr. Deatelhauser could scarcely have seen, never mind have stopped, an impulsive child from reaching between the fencing and touching the tigers.

Further, the record does not establish that the volunteers were instructed on specific plans for capture or restraint of tigers or were prepared to respond to an animal attack. Ms. Cramer has significant experience in educating and handling crowds, but there is little evidence that she would know how to restrain the lion if he decided to jump the wall that separated him from the viewing public on these special tours. Ms. Cramer's reliance on her familiarity with the animals and their moods appears misplaced in these circumstances, given the inherently dangerous nature of lions and tigers.

The evidence demonstrates the public was extremely close to animals that were controlled solely by two volunteers who are familiar with the animals but have no special training in containing them, preventing their escape, or controlling them in the event of an attack. Given the limited handling training for the volunteers, the number of people in attendance, the close proximity of dangerous animals, the lack of a formal plan to control animals in the event of escape, combined with the potential for people to physically come

into contact with the animals, I find, during the behind-the-scenes exhibitions, such as were observed on June 2, 2008, Tri-State and Mr. Candy violated 9 C.F.R. § 2.131(c)(1) by failing to handle animals so there was minimal risk of harm to the animals and to the public.

Squirrel Monkey

Dr. McFadden conducted an inspection of Tri-State's facility on September 29, 2010, and found openings in the wire mesh entry door of a squirrel monkey's enclosure that permitted contact between the squirrel monkey and the public (Tr. at 132, 134; CX 14). Dr. McFadden was concerned that the gauge of the wire mesh was wide enough to allow people to put their fingers through it (Tr. at 136). On cross-examination, Dr. McFadden agreed that the squirrel monkey had occupied that enclosure for some time and she had never before issued a citation for the condition of the enclosure (Tr. at 311). Mr. Candy observed that the squirrel monkey had been in the same location with the same conditions for 5 years, and Tri-State and Mr. Candy were not cited for a problem with the construction before this inspection (Tr. at 820). Nevertheless, I find the Administrator proved this September 29, 2010, violation of 9 C.F.R. § 2.131(c)(1) by a preponderance of the evidence.

2. Housing Facilities

The Regulations require that animal housing facilities meet structural requirements and that exhibitors provide animals with shelter from inclement weather, as follows:

§ 3.125 Facilities, general.

(a) *Structural strength.* The facility must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals.

§ 3.127 Facilities, outdoor.

....
(b) *Shelter from inclement weather.* Natural or artificial shelter appropriate to the local climatic conditions for the species concerned shall be provided for all animals kept outdoors to afford them protection and to prevent discomfort to such animals. Individual animals shall be acclimated before they are exposed to the extremes of the individual climate.

9 C.F.R. §§ 3.125(a), .127(b).

Lion Enclosure

Tri-State and Mr. Candy were repeatedly cited for failure to provide a structurally sound lion enclosure (CX 3, CX 7, CX 10-CX 14). Dr. McFadden testified that at her inspection on May 17, 2006, she observed that “the lion cage, the home panels at the bottom of the enclosure, they were not attached to the bottom in any way, and side posts weren’t securely attached at that time, and there were some gaps as well that the animal could reach under or dig under.” (Tr. at 39.) Dr. McFadden testified about photographs that she took, which depicted hog panels and different kinds of fencing held together by clips. In her opinion, the failure of one kind of fencing could cause a break in a section of fencing and the potential escape of the lion (Tr. at 49). Dr. McFadden testified that the

gauge of the fence would not have prevented the lion from escaping if he attempted to get out (Tr. at 68). She also believed the use of railroad ties at the bottom of the hog panel fence created "[t]he potential for it to detach over time or [be] bothered or tampered with, I guess." (Tr. at 104.)

On September 26, 2007, Dr. McFadden found the entrance door of the lion enclosure, constructed of treated wood and small gauge wire, would not contain the lion (CX 7; Tr. at 67).

Dr. McFadden took pictures of the various kinds of fencing used to build the lion enclosure and included the pictures with her inspection report from September 30, 2009 (CX 11). She informed Mr. Candy of her concerns that the fencing was not "traditional" and did not "necessarily meet the industry standard that [she] generally would see. So it was making an assessment of whether it was appropriate difficult." (Tr. at 110.)

Dr. McFadden referred to photographs showing corner metal poles connected to corner wooden poles with clamps and other sections of fencing connected with wire clips (CX 11). She found the construction methods and materials "questionable" as she doubted their durability and strength (Tr. at 111-13). Dr. McFadden's report of her September 30, 2009, inspection detailed her concerns about the use of multiple kinds of materials fixed together with clamps and plastic ties (CX 11; Tr. at 111-12).

At her inspections on November 20, 2009, and May 19, 2010, Dr. McFadden again cited Tri-State and Mr. Candy with violations related to the soundness of the lion's

enclosure because nothing had changed and the materials were the same (Tr. at 121, 127; CX 12-CX 13). At her inspection on September 29, 2010, Dr. McFadden observed that an overhang made of wood planks and high tensile wire had been added to the lion enclosure, but she still had concerns about the structure (Tr. at 138-41; CX 14).

In response to questioning by Mr. Candy, Dr. McFadden admitted she could not specifically state the exact nature of the defects in the lion enclosure, other than that she believed it potentially would be unable to contain the lion (Tr. at 171-72). Dr. McFadden testified that industry standards are considered when determining whether an exhibitor is in compliance with the Animal Welfare Act (Tr. at 171-72). In addition, the Animal and Plant Health Inspection Service's big cat expert was unfamiliar with the hog wire panels used by Tri-State and Mr. Candy (Tr. at 174-75). Dr. McFadden acknowledged that the lion has occupied the enclosure space for 6 years without an escape (Tr. 172).

Dr. McFadden testified that the lion enclosure was "not the most pleasing exhibit" and one of her reasons for citing non-compliance was to "minimize complaints." (Tr. at 175.) Dr. McFadden admitted she had offered no alternative solution to Tri-State and Mr. Candy and further admitted that, over the years, Tri-State and Mr. Candy have added to the enclosure to increase its strength (Tr. at 172, 176). She had not observed breaks in the high tensile fence erected by Tri-State and Mr. Candy (Tr. at 177). The fence is built with metal poles buried in the ground and is attached to horizontal metal poles as well as vertical poles 11 feet high. The hog panels were added by Tri-State and

Mr. Candy after discussions with Dr. McFadden regarding how to improve the fence.

(Tr. at 178.)

Dr. McFadden reiterated her opinion that, when a fence is constructed of different materials, the potential for a break in one kind of material could decrease the overall strength of the fence (Tr. at 179). She recalled being able to move one of the panels, which she concluded showed that the fence was not structurally sound (Tr. at 180).

Dr. McFadden referred to pictures that showed the fence was not consistently constructed (CX 11). Sometimes poles were erected between fencing, sometimes poles were inside the fence, and sometimes poles were outside the fence. The support posts appeared rusty and there were gaps in the fencing, as well as between the fencing and the ground (Tr. at 180).

In Dr. McFadden's opinion, the poles should be placed outside the fence because, if an animal would push on the fence, the poles would stop the fence from moving further (Tr. at 185). She conceded that the strength of a fence and placement of poles depended on the type of materials and manner of construction (Tr. at 186). Dr. McFadden agreed that changes made by Tri-State and Mr. Candy increased the strength of the lion enclosure, but, overall, Dr. McFadden had doubts about the structural integrity of the fence (Tr. at 186-88).

Dr. McFadden acknowledged that Mr. Candy had requested an opinion about the fence from the Animal and Plant Health Inspection Service's big cat expert, who did not

offer one (Tr. at 188). Dr. McFadden would have appreciated a second opinion from the specialist regarding whether the lion enclosure was in compliance with the Animal Welfare Act and the Regulations. She had discussed with Mr. Candy her desire for a resolution of the issue from another source. (Tr. 307-09.) Dr. McFadden further agreed that the basis for Tri-State and Mr. Candy's non-compliance with respect to the lion's enclosure was that the fence may not be structurally sound rather than an affirmative opinion that the fence is not structurally sound (Tr. at 190-91).

Dr. Ellen Magid has been a supervisory animal care specialist with the Animal and Plant Health Inspection Service since 1994 (Tr. at 389-90). In September 2009, Dr. Magid accompanied Dr. McFadden on an inspection of the Tri-State facility (Tr. at 391-92). She recalled inspecting the lion enclosure and finding an area of fencing that she could move back and forth. Dr. Magid talked about the "wobbly" fence with Mr. Candy, who advised her that he wanted the loose fence as he believed it would be harder for the lion to get out (Tr. at 392-93). She could not recall any specific reason for Mr. Candy's opinion, though she remembered discussing his rationale with him, as well as discussing the merits of different kinds of fencing (Tr. at 394).

Dr. Magid favors chain link fence over a hog panel fence because, in her opinion, with hog panel fencing, "the animals can reach out with paws and sometimes up to their shoulders." (Tr. at 395.) Dr. Magid admitted that hog panel fencing met the regulatory minimum standards (Tr. at 408).

Dr. Magid had observed a gap in the bottom of the lion enclosure of about two and one half feet in one section. She also did not like the fence "waving" as the movement could cause metal fatigue. (Tr. at 396, 399-400.) Dr. Magid did not agree with Mr. Candy's theories about the flexibility of a fence adding to its safety and found the lion's enclosure was not structurally sound (Tr. at 401-03). Although Dr. Magid was aware that the lion had lived for a long time in that enclosure without escape, she remembered an incident when he almost escaped (Tr. at 403-04).

Dr. Magid's overall concern with the lion's enclosure was that it was constructed of many different materials that were joined together in different fashions in a manner that made it difficult to assess its structural integrity (Tr. at 409). The various kinds of materials required maintenance to prevent rusting, fatigue, and breakage (Tr. at 410). Although the Animal and Plant Health Inspection Service's big cat specialist was not available to personally inspect Tri-State and Mr. Candy's facility, she looked at pictures of the fencing and reached conclusions similar to those of Dr. Magid (Tr. at 411). The big cat specialist did not give her opinion in written form (Tr. at 411; RX 11).

Timothy Squires is a police officer who volunteers at the Tri-State facility (Tr. at 590-93). Mr. Squires has also worked as a county code enforcement officer (Tr. at 592). He acquired construction experience by building his own home and other buildings (Tr. at 646). Mr. Squires does a little of everything at the Tri-State facility, but is primarily involved in building and maintaining enclosures (Tr. at 593).

Mr. Squires took pictures of the facility and referred to them during his testimony (RX 15-RX 22). He did not build the lion enclosure but was familiar with its construction and described it from a photograph (RX 17) as consisting of 8 foot by 20 foot panels made of four inch square six gauge fencing on the outside of metal posts, with high tensile wire above the post and chain link fence below the post (Tr. at 663). The wires are attached with hog-rings and clamped to the horizontal poles, but Mr. Squires could not say from the picture how they are attached at the corners (Tr. at 664-65). Railroad ties are at the base of the fencing and are attached to the fence (Tr. at 665). Another picture showed that, at the corners, fencing is held to the posts by clamps (Tr. at 666). Tension straps further stabilize the fence (Tr. at 666).

Tri-State and Mr. Candy have changed all perimeter fences and replaced three foot fences with eight foot fences (Tr. at 638-39). Mr. Squires confirmed that Tri-State and Mr. Candy planned to confine all large cats to one area of the facility located near the center of the premises and contained within a perimeter fence (Tr. at 640). Mr. Squires described the lion enclosure that was then under construction at the facility, using photographs that he took to illustrate his explanations (Tr. at 634; RX 21). He testified that metal poles that hold the fencing are sunk into the ground several inches and stand about 12 feet high (Tr. at 634-35). Mr. Squires stated that Mr. Candy was debating the relative merits of using chain link fence, compared to wire gauge fence, which

Mr. Squires prefers (Tr. at 640-42). Mr. Squires thinks chain link is flimsier and does not repair as well as panel fencing (Tr. at 641).

Mr. Squires described how he and Mr. Candy placed wire fencing over a wooden perimeter fence with a wooden platform when Dr. McFadden directed them to do so (Tr. at 643-44). Tri-State and Mr. Candy have attempted to address every concern that Dr. McFadden shared by adding fencing and strengthening existing fencing (Tr. at 647-51; RX 18, RX 22). Mr. Squires believes that the fences at Tri-State are structurally sound (Tr. at 647). Mr. Squires explained the integrity of the materials and the construction of the fencing by showing samples of the materials used (Tr. at 671-76).

Mr. Squires testified that the presence of rust does not present a threat to the strength of metal unless the rust corrodes the metal (Tr. at 675). He typically sands and paints rusted parts and replaces parts that have deteriorated (Tr. at 676-77). Mr. Candy pointed out that the fencing was secured to the railroad ties, which were secured to poles (Tr. at 753).

Dr. McFadden and Dr. Magid did not like certain aspects of the lion enclosure fencing, particularly the gaps in the fence and where the fence joined and appeared slack, which photographs corroborate. Although she did not provide a written opinion, the Animal and Plant Health Inspection Service's big cat specialist, Dr. Laurie Gage, agreed with the inspectors that the lion enclosure was not sound. Mr. Candy recalled discussing

the fencing with both Dr. McFadden and Dr. Magid, and he testified he did not get an opinion about the fence's integrity from Dr. Gage (Tr. at 741).

Although Dr. Magid conceded that hog wire panels met the regulatory standards, her major concerns were with the construction methods used in the fencing and not the materials. The photographs depict a structure that looks cobbled together. I accord substantial weight to Mr. Squires' testimony regarding the strength of the fencing, the security of the panels and the railroad ties, and the difference between a layer of rust and corroded metal. Although Mr. Squires is not a construction expert, he has experience in building and his testimony credibly explained why the structure had integrity. However, I equally credit the testimony of the Animal and Plant Health Inspection Service inspectors, who regularly assess the strength of animal enclosures. The inspectors were concerned about gaps in areas where fencing was joined and at the bottom of the fence. They were concerned about the variety of materials used to join the fencing in corners. The fence was pliable at places, which represented an additional concern.

Dr. McFadden admitted that she cited Tri-State and Mr. Candy for the failure to provide a structurally sound lion enclosure out of her concerns that the fence "may" not be structurally sound. Although Dr. McFadden provided no specific instructions to Tri-State and Mr. Candy on how to satisfy her concerns about the fence, she did repeatedly point out its flaws, and Dr. Magid shared her opinion. Dr. McFadden testified that the fence did not meet industry standards. The record does not describe those

standards nor is reference made to a professional organization that issues such standards. Despite her allusion to "industry standards," Dr. McFadden's citations addressed specific conditions that Tri-State and Mr. Candy could have remedied.

Despite the somewhat speculative nature of Dr. McFadden's concerns about the fence, I find the preponderance of the evidence establishes that the fence did not meet the standards for structural integrity found in 9 C.F.R. § 3.125(a). Repeated inspections revealed different problems with the fencing that impinged upon its reliability.

Although Mr. Candy questioned what more he could do to come into compliance and asserted that the Animal and Plant Health Inspection Service failed to give him guidance, I find the inspection reports specifically identify deficits that should have been corrected. I find Dr. McFadden fully believed that the fence was unsound, but had no real and specific idea on how Tri-State and Mr. Candy could come into compliance with the structure as it existed. I note Dr. Goldentyer's suggestion that Tri-State and Mr. Candy would know how to come into compliance by comparing the lion's enclosure to structures that were not cited for violations of the Regulations (Tr. at 865-66).

Considering the record as a whole, I find the Administrator has established that the lion's enclosure was not structurally sound in violation of 9 C.F.R. § 3.125(a).

Young Cat Enclosure

On an inspection on September 26, 2007, Dr. McFadden cited Tri-State and Mr. Candy with failing to construct an enclosure for a large cat, referred to as a lion, in a

manner sufficient to contain the animal (CX 7). On cross-examination, Dr. McFadden corrected the citation, acknowledging that the enclosure actually held Tri-State and Mr. Candy's young tiger (Tr. at 233). Dr. McFadden explained that there were "two doors, sort of a space in between a keeper area or a lock-out area." (Tr. at 235.) She believed that the small gauge of the wire door "would not withstand the strength of the animal" (Tr. at 235). Mr. Candy described how he had reinforced the door to this enclosure with another panel of six gauge wire (Tr. at 783), and Dr. McFadden acknowledged that Tri-State and Mr. Candy added hog-wire fence to the area (Tr. at 236).

Dr. McFadden again found a problem with the young tiger enclosure on May 19, 2010 (CX 13). At that time, Dr. McFadden observed that a tree had grown inside the enclosure, which the tiger could climb and escape (Tr. at 128). Mr. Candy explained how trees had been growing out of an old pool back in 2008, 2 years before he rebuilt the enclosure for the tiger (Tr. at 818-19). He stated the tree that Dr. McFadden had observed was small and was immediately removed (Tr. at 819; CX 13).

The Administrator has established these September 26, 2007, and May 19, 2010, violations of 9 C.F.R. § 3.125(a), but Tri-State and Mr. Candy have established that the violations were corrected.

Llama and Goat Enclosure

During inspections conducted on November 29, 2006, and May 23, 2007, Dr. McFadden observed that wire fencing around the llama and goat enclosure was

detached from the ground, causing sharp wire to protrude into the enclosure (CX 5-CX 6). Dr. McFadden was concerned that the protruding wire could injure an animal or that an animal could escape (Tr. at 56). Dr. McFadden had seen a miniature horse damaging the fence, and Mr. Candy had told her that the horse damaged the fence on a regular basis (Tr. at 57, 59, 222).

Dr. McFadden agreed that Tri-State and Mr. Candy fixed the problem whenever she pointed it out, but she was not sure that the problem was ever permanently corrected (Tr. at 218, 222). She had no pictures of the damage because she typically does not retain pictures of inspections for more than 3 years (Tr. at 217-18). Mr. Candy testified “that horse is no longer with us” (Tr. at 765).

The evidence establishes this continuing violation of 9 C.F.R. § 3.125(a). Tri-State and Mr. Candy are credited with making repairs, but the record clearly demonstrates that the problem remained so long as the horse was housed in that location.

Arctic fox

At her inspection on November 29, 2006, Dr. McFadden observed a hole in the roof of the structure housing an arctic fox (CX 5; Tr. at 57). Tri-State and Mr. Candy corrected the defect on the date of the inspection (Tr. at 219). This violation of 9 C.F.R. § 3.127(b) is supported by the evidence.

3. Waste Disposal

The Regulations require exhibitors to dispose of waste, as follows:

§ 3.125 Facilities, general.

....

(d) *Waste disposal.* Provision shall be made for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris. Disposal facilities shall be so provided and operated as to minimize vermin infestation, odors, and disease hazards. The disposal facilities and any disposal of animal and food wastes, bedding, dead animals, trash, and debris shall comply with applicable Federal, State, and local laws and regulations relating to pollution control or the protection of the environment.

9 C.F.R. § 3.125(d).

Bedding and rodent feces in the fennec fox and agouti enclosures

On May 17, 2006, Dr. McFadden observed an excessive amount of waste and bedding in an enclosure housing an agouti and a fennec fox (CX 3; Tr. at 41). Dr. McFadden described a two-tiered enclosure occupied by the fox on the top and the agouti on the bottom (Tr. at 41-43). Mr. Candy testified that the agouti was not housed directly beneath the fox, but rather that the area described by Dr. McFadden allows for air ventilation, heat distribution, and drainage (Tr. at 756). He agreed that excess bedding could have been removed, but disagreed that feces had accumulated in the area next to the agouti enclosure (Tr. 756). Mr. Candy admitted an excess of feces was in areas near animal habitats. It is immaterial that the agouti was not directly in contact with the waste. I find the Administrator proved this violation of 9 C.F.R. § 3.125(d) by a preponderance of the evidence.

Excessive waste and excreta in pools

On June 2, 2008, Dr. McFadden found an excessive amount of excreta in a small pool where two adult tigers defecated and urinated and cited Tri-State and Mr. Candy for a violation of 9 C.F.R. § 3.125(d) (CX 8; Tr. at 91). The water was murky, and Dr. McFadden believed that the pool needed to be cleaned more often (Tr. at 90-91). Dr. McFadden cited Tri-State and Mr. Candy with repeated violations of 9 C.F.R. § 3.125(d) on August 3, 2009 (CX 10; Tr. at 105), on September 30, 2009 (CX 11; Tr. at 114-15), and on November 20, 2009 (CX 12; Tr. at 122).

Mr. Candy explained that the pool referenced in the June 2, 2008, and August 3, 2009, inspection reports served solely as the "tiger toilet" (Tr. at 794). Dr. McFadden generally conducts inspections on Wednesdays and is present when the enclosures are being cleaned (Tr. at 726). The pool was cleaned on Wednesdays and Sundays (Tr. at 794-95). Mr. Candy speculated that Dr. McFadden observed what she considered excess waste in the "tiger toilet" because the pool had not yet been cleaned that day (Tr. at 794). Tri-State and Mr. Candy's schedule was interrupted when Dr. McFadden arrived, and the area was cleaned after she concluded her inspection (Tr. at 795). The tigers no longer occupy that space, but are in a new exhibit (Tr. at 830). Mr. Candy believed citations for conditions that were temporary and were scheduled to be corrected was somewhat arbitrary (Tr. at 771).

On September 30, 2009, and November 20, 2009, Dr. McFadden cited Tri-State and Mr. Candy for the condition of the swimming pool in the area housing the large Siberian tiger and the area where the tiger cubs were housed (Tr. at 810). That pool is made of dark green concrete and Mr. Candy believed the pool looked murkier to Dr. McFadden than it really was because of the color of the paint on the pool and the mulch in the pool (Tr. at 811). Mr. Candy observed that Dr. McFadden was 100 feet away from the pool, and the distance was far enough to make the water appear dark (Tr. at 831). Tri-State and Mr. Candy have resolved the problem with mulch in the tiger pool by removing the mulch; the pool is now surrounded only by concrete (Tr. at 831-32).

I fully credit Mr. Candy's testimony that the areas in question were cleaned twice a week, on Wednesdays and Sundays. However, the fact that Dr. McFadden repeatedly cited Tri-State and Mr. Candy with violations of 9 C.F.R. § 3.125(d) is supported by Mr. Candy's cleaning schedule. I conclude that Mr. Candy is mistakenly convinced that his methods are sound, and I find the Administrator proved by a preponderance of the evidence that Tri-State and Mr. Candy violated 9 C.F.R. § 3.125(d) on June 2, 2008, and August 3, 2009.

However, the evidence regarding the murky pool that was impinged by mulch and painted a color that enhances the murk is vague. I credit the testimony that Tri-State and Mr. Candy changed the sanitation methods regarding this water source in an effort to avoid future citations, but I also find that nothing of record establishes that this pool was

excessively unclean or posed a risk to the health and welfare of the animals. I credit the testimony that the distance between the pool and observer would make it difficult to determine how clean the water was. I further credit the testimony that the water is filtered and sump pumped routinely. These violations of 9 C.F.R. § 3.125(d) that are alleged to have occurred on September 30, 2009, and November 20, 2009, are dismissed.

4. Perimeter Fence

The Regulations require exhibitors to enclose outdoor facilities with a perimeter fence, as follows:

§ 3.127 Facilities, outdoor.

....
 (d) *Perimeter fence.* . . . [A]ll outdoor housing facilities . . . must be enclosed by a perimeter fence that is of sufficient height to keep animals and unauthorized persons out. Fences less than 8 feet high for potentially dangerous animals, such as, but not limited to, large felines (e.g., lions, tigers, leopards, cougars, etc.), bears, wolves, rhinoceros, and elephants, or less than 6 feet high for other animals must be approved in writing by the Administrator. The fence must be constructed so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it or under it and having contact with the animals in the facility, and so that it can function as a secondary containment system for the animals in the facility. It must be of sufficient distance from the outside of the primary enclosure to prevent physical contact between animals inside the enclosure and animals or persons outside the perimeter fence. Such fence less than 3 feet in distance from the primary enclosure must be approved in writing by the Administrator.

9 C.F.R. § 3.127(d).

On September 7, 2006, Dr. McFadden found that Tri-State and Mr. Candy had failed to enclose facility for servals with a perimeter fence (CX 4). The servals were in

a temporary enclosure that did not have a perimeter fence three feet from the enclosure fence in the back (Tr. at 54). Dr. McFadden explained that, although there was a perimeter fence generally around the facility, there was a break in the wall in this particular area, which represents a failure to create a secondary containment system that would keep an animal from escaping the premises (Tr. at 54-56, 216).

During Dr. McFadden's inspection on September 26, 2007, the serval was no longer in that enclosure, but the problem persisted. No complete perimeter fence had been erected, and a tiger was housed in the enclosure (CX 7A; Tr. at 68-69).

Dr. McFadden cited Tri-State and Mr. Candy because the back wall of the tiger enclosure was not within a perimeter fence (CX 7A; Tr. at 72-74).

Mr. Candy believed that a solid wall around the young tiger enclosure was sufficient to serve as a perimeter fence but nevertheless put up another fence when Dr. McFadden expressed reservations about the existing wall (Tr. at 786). Dr. McFadden acknowledged that a solid wall could serve as a perimeter fence, since the Regulations do not require a particular fencing material (Tr. at 217). Dr. McFadden conceded that there was a wall present in the area, but it was not three feet from the enclosure as required by 9 C.F.R. § 3.127(d) (Tr. at 237).

On September 26, 2007, and on August 3, 2009, Dr. McFadden noted that the perimeter fence near the lion's enclosure was leaning inward, and, therefore, did not provide an adequate barrier (CX 7, CX 10; Tr. at 105). The fence was "[s]lightly, but

noticeab[ly]" leaning inward (Tr. at 289). The fence was leaning at the top of its eight foot height, and Dr. McFadden could not recall whether it was braced on either side (Tr. at 289). Pictures that Dr. McFadden took at both inspections show the fence leaning, and it appeared to be leaning more in 2009 (CX 7, CX 10; Tr. at 292). Dr. McFadden and Mr. Candy discussed the issue, and Mr. Candy understood that the fence needed to be made sturdier, and he straightened it out (Tr. at 812). The Administrator's concern about the structural integrity of the perimeter fence near the lion's enclosure is supported by the fact that the August 3, 2009, inspection revealed that fence was leaning more than it had been leaning during the September 26, 2007, inspection.

I find the Administrator proved the September 7, 2006, September 26, 2007, and August 3, 2009, violations of 9 C.F.R. § 3.127(d) by a preponderance of the evidence.

5. Animal Health and Husbandry Standards

The Regulations require sanitation, as follows:

§ 3.131 Sanitation.

(a) *Cleaning of enclosures.* Excreta shall be removed from primary enclosures as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and to reduce odors. When enclosures are cleaned by hosing or flushing, adequate measures shall be taken to protect animals confined in such enclosures from being directly sprayed with the stream of water or wetted involuntarily.

....

(d) *Pest control.* A safe and effective program for the control of insects, ectoparasites, and avian and mammalian pests shall be established and maintained.

9 C.F.R. § 3.131(a), (d).

On November 29, 2006, Dr. McFadden observed an excessive amount of feces in several enclosures (CX 5; Tr. at 59). Mr. Candy advised that enclosures were cleaned once a week, which Dr. McFadden considered to be inadequate to prevent contamination and health hazards (Tr. at 59-60). On her inspection conducted on May 23, 2007, Dr. McFadden observed accumulated excreta, dirt, and hair in the tiger enclosure (CX 6; Tr. at 60-61). She cited Tri-State and Mr. Candy with a repeated violation for not cleaning enclosures frequently enough (Tr. at 61-62).

During her inspection on August 3, 2009, Dr. McFadden found an excessive amount of excreta in the enclosures for cougars, servals, bobcats, pigs, and goats. Dr. McFadden believed the problem would be resolved with more frequent cleaning. (Tr. at 106; CX 10.) Mr. Candy had worked in the field of environmental services and has written policies regarding proper cleaning and building maintenance for companies such as Sodexo and Marriott (Tr. at 693-94). Mr. Candy is certified in cleaning and sanitation and feels qualified to determine how to maintain facilities so they are properly cleaned and sanitized (Tr. at 694). He and his volunteers follow a schedule for cleaning the facility (Tr. at 705). Mr. Candy has developed checklists that volunteers must use to record completion of assigned tasks. He trains volunteers in the best way to clean the facility and uses industry-recognized cleaning agents. Vinegar is used inside, near the animals, and outside facilities are cleaned with a water and bleach mixture. (Tr. at 714-17.)

The animal areas are cleaned daily and power-washed every two weeks (Tr. at 718). Mr. Candy asserted that Dr. McFadden is aware of the schedule and approved of his power-washing schedule. According to Mr. Candy, Dr. McFadden had never suggested a different schedule for removing feces or other routine maintenance (Tr. at 719, 725). Mr. Candy cleans large cat cages, and he cannot be cleaning on inspection days when he is required to tour the premises with the inspector (Tr. at 771). The areas of fencing that tigers previously rubbed against and that accumulated hair have been changed and are no longer attractive to the cats for that purpose (Tr. at 772).

Mr. Candy's insistence on adhering to his pre-established cleaning schedule demonstrates that he fails to comprehend Dr. McFadden's concerns. He has been repeatedly and frequently cited for deficiencies of cleanliness standards, yet maintains that Dr. McFadden has not suggested adjusting his cleaning practices. I find Tri-State and Mr. Candy have made little effort to accommodate Dr. McFadden's concerns. Although Mr. Candy deems himself an expert in sanitation, the businesses in which he worked prior to his current enterprise do not replicate conditions at a zoo.

I find the Administrator proved the November 29, 2006, May 23, 2007, and August 3, 2009, violations of 9 C.F.R. § 3.131(a) by a preponderance of the evidence.

During the inspection on May 17, 2006, Dr. McFadden saw a mouse in the binturong enclosure (CX 3). It was obvious to Dr. McFadden that the mouse was staying

in the enclosure, and she opined that the presence of one rodent generally signified additional mice and an inadequate pest control system (Tr. at 46).

On May 23, 2007, Dr. McFadden noted numerous flies in the reptile house and concluded that Tri-State and Mr. Candy had not taken effective measures to reduce their numbers (CX 6; Tr. at 62-63). She observed a number of fly strips and knew of no other pest control measure used by Tri-State and Mr. Candy (Tr. at 63).

On June 2, 2008, Dr. McFadden saw the decomposed carcass of a mouse in a trap near the young tiger's enclosure (CX 8; Tr. at 95). Although she could not say whether the picture she viewed depicted the mouse trap inside the enclosure (CX 8 at 15), she nevertheless concluded that Tri-State and Mr. Candy did not have effective pest control measures that included frequent checking of traps to remove dead rodents (Tr. at 95-96).

Mr. Candy has a written pest control program, but acknowledged that sometimes conditions require adjustments, such as in May 2007, when an excessive number of flies were on site. An individual who previously had an animal exhibition now runs a pest control company and Tri-State uses his services. (Tr. at 773.)

I find the evidence supports that better pest control was necessary at the Tri-State facility. The allegations that Tri-State and Mr. Candy violated 9 C.F.R. § 3.131(d) on May 17, 2006, May 23, 2007, and June 2, 2008, are supported by the evidence.

6. Employees

The Regulations require that exhibitors utilize a sufficient number of trained employees, as follows:

§ 3.132 Employees.

A sufficient number of adequately trained employees shall be utilized to maintain the professionally acceptable level of husbandry practices set forth in this subpart. Such practices shall be under a supervisor who has a background in animal care.

9 C.F.R. § 3.132.

During her inspection on May 17, 2006, Dr. McFadden cited Tri-State and Mr. Candy for failure to have adequate numbers of sufficiently trained employees on site (CX 3). It was evident to Dr. McFadden that Tri-State and Mr. Candy did not have enough properly trained staff due to the number of problems she had observed (Tr. at 46-47). She believed that Tri-State's volunteers needed guidance from someone with expertise in animal husbandry (Tr. at 47).

In 2004, Mr. Candy and two volunteers attended a "Big Cat Symposium" (Tr. at 714-15). Tri-State and Mr. Candy have not provided any other formal training to the Tri-State volunteers, but Mr. Candy stated he has established strict rules about maintenance and care of the animals and closely supervises his volunteers (Tr. at 715). Tri-State's rules include health and safety policies, and volunteers are required to note and sign a list of tasks that they complete during their tours of duty (Tr. at 716). The checklist requires observations about the condition of the animals and facility, and volunteers are expected to make entries when they arrive for their shifts and again when

they leave. Mr. Candy is always available to answer questions. (Tr. at 717.) Mr. Candy expects volunteers to record weather conditions, any changes they notice in the animals, maintenance issues, and any thing else they consider important (Tr. at 724-25).

Volunteers are trained on an on-going basis, and the zoo uses the specific talents and expertise of its volunteers (Tr. at 719). Tri-State does not provide manuals to volunteers, other than the check list and rules. Mr. Candy is in charge of the zoo, and Mr. Candy expects the volunteers to heed his instructions. (Tr. at 722.) The checklists are kept in the reptile house (Tr. at 723-25; RX 23). One volunteer is designated as the "main volunteer" daily (Tr. at 726). The main volunteer works the same day each week and is generally responsible for feeding the animals (Tr. at 726-27). In addition, people live on the premises and provide security on a consistent basis (Tr. at 727).

Mr. Candy testified that Dr. McFadden has told him that four people should be on duty at a time (Tr. at 759). Mr. Candy believed that he had sufficient workers (Tr. at 759-60). Mr. Candy asserted he had adequate experience in animal care, expertise in facility maintenance, and knowledge of animal husbandry (Tr. at 761). Mr. Candy has managed a horse farm in Pennsylvania and was responsible for cleaning and sanitizing universities, hospitals, and veterinary clinics (Tr. at 761-62). Mr. Candy developed procedures with the consultation of an individual with zoo experience (Tr. at 762). That individual is now working for another zoo, and another individual that Mr. Candy hired as an animal consultant is no longer with Tri-State (Tr. at 762-63).

I credit Mr. Candy's years of experience working with animals and conferring with veterinarians and other animal experts and conclude he has adequate experience to operate Tri-State. However, the preponderance of the evidence demonstrates that Tri-State is not adequately staffed. Tri-State and Mr. Candy have been repeatedly cited for violations that could have been avoided if people were tasked to make routine maintenance inspections to correct such problems as breaches in fencing, pest control, and unsanitary conditions. Although Tri-State and Mr. Candy's use of a check list for volunteers is laudatory, it is inadequate to prevent those types of infractions that were routinely observed by Dr. McFadden on her inspections.

The size of the Tri-State facility, both in area and number of animals, and the repeated problems observed by inspectors, support Dr. McFadden's contention that at least four people should be on site while Tri-State is open for operation. The Administrator has established the May 17, 2006, violation of 9 C.F.R. § 3.132 by a preponderance of the evidence.

7. Handling, Care, and Treatment of Nonhuman Primates

The Regulations require exhibitors to control pests affecting nonhuman primates, as follows:

§ 3.84 Cleaning, sanitization, housekeeping, and pest control.

....

(d) *Pest control.* An effective program for control of insects, external parasites affecting nonhuman primates, and birds and mammals that are pests, must be established and maintained so as to promote the

health and well-being of the animals and reduce contamination by pests in animal areas.

9 C.F.R. § 3.84(d).

On her inspection conducted on September 29, 2010, Dr. McFadden noticed rodent holes in the lemur house (CX 14; Tr. at 153). As discussed in this Decision and Order, *supra*, the Administrator has established that Tri-State's pest control plan is not consistently effective; therefore, I find the Administrator proved by a preponderance of the evidence that Tri-State and Mr. Candy violated 9 C.F.R. § 3.84(d) on September 29, 2010.

8. Attending Veterinarian and Adequate Veterinary Care

The Regulations require that each exhibitor have an attending veterinarian who provides adequate veterinary care, as follows:

§ 2.40 Attending veterinarian and adequate veterinary care (dealers and exhibitors).

(a) Each dealer or exhibitor shall have an attending veterinarian who shall provide adequate veterinary care to its animals in compliance with this section.

(1) Each dealer and exhibitor shall employ an attending veterinarian under formal arrangements. In the case of a part-time attending veterinarian or consultant arrangements, the formal arrangements shall include a written program of veterinary care and regularly scheduled visits to the premises of the dealer or exhibitor; and

(2) Each dealer and exhibitor shall assure that the attending veterinarian has appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use.

(b) Each dealer or exhibitor shall establish and maintain programs of adequate veterinary care that include:

- (1) The availability of appropriate facilities, personnel, equipment, and services to comply with the provisions of this subchapter;
- (2) The use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care;
- (3) Daily observation of all animals to assess their health and well-being; *Provided, however*, That daily observation of animals may be accomplished by someone other than the attending veterinarian; and *Provided, further*, That a mechanism of direct and frequent communication is required so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian;
- (4) Adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization, and euthanasia; and
- (5) Adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures.

9 C.F.R. § 2.40.

On June 2, 2008, and September 3, 2008, Tri-State and Mr. Candy failed to provide Dr. McFadden with a copy of a written program of veterinary care (CX 8-CX 9; Tr. at 75-76, 97-98). As a result, Dr. McFadden was unable to determine whether Tri-State and Mr. Candy had a veterinarian on call or had developed a plan for care (Tr. at 75). Mr. Candy testified that he has no place to keep his records on site since Tri-State lost a building in a fire (Tr. at 706). He is reluctant to keep records in the gift shop or any other building open to the public (Tr. at 707). However, he is aware that Dr. McFadden generally spends two days inspecting the Tri-State facility, and he consistently provides her with all the records, including plans of veterinary care and enrichment for nonhuman primates, on the morning of the second day of Dr. McFadden's inspection (Tr. at 707).

When pressed to explain why he could not maintain the records in the place where he keeps check lists, Mr. Candy testified that he did not think it was appropriate to keep the records in that location, which is a kitchen that stores animal feed (Tr. 730). He distinguished those records from the logs, which are used daily (Tr. at 731). Despite being cited for repeated violations, he had never failed to provide the records (Tr. at 731-32). He maintains that so long as he “cures” defects, he should be considered compliant with the Animal Welfare Act and the Regulations.

The records are always made available to Dr. McFadden; however, the Animal and Plant Health Inspection Service has the right to see records at an unannounced inspection to assure itself that the records have not been changed to conform with the Regulations. See, *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 489 (1991).

Mr. Candy’s resistance to keeping the records on-site demonstrates a lack of cooperation and commitment to full compliance with the Animal Welfare Act and the Regulations. Tri-State and Mr. Candy’s violations of 9 C.F.R. § 2.40(a) on June 2, 2008, and September 3, 2008, are supported by the evidence.

On September 7, 2006, Dr. McFadden noticed that one of Tri-State and Mr. Candy’s goats needed to have its hooves trimmed (Tr. at 53-54). The goat has a genetic deformity on its hooves, but the hooves also were overgrown (CX 4; Tr. at 54). On August 3, 2009, Dr. McFadden noticed two limping goats and documented their gait to make sure they received veterinary attention (CX 10; Tr. at 102). On November 20,

2009, Dr. McFadden again noted a violation of 9 C.F.R. § 2.40 even though the goats' hooves had been trimmed (CX 12). Dr. McFadden explained that Tri-State and Mr. Candy had failed to provide a record from a veterinarian acknowledging the condition of the goats' hooves and establishing a schedule for trimming them. Tri-State and Mr. Candy had no documentation from a veterinarian diagnosing the chronic condition. (Tr. at 121.)

Mr. Candy explained that some of the goats at Tri-State had a genetic defect that creates a consistent problem with their hooves, which was known to their veterinarian (Tr. at 757). Mr. Candy does not consider the genetic malformation a medical condition that requires a schedule of care, but he is aware that the condition affects the goats and he tries to tend to their needs (Tr. at 757-58).

The evidence regarding veterinary care for goats with a genetic condition is substantiated. The existence of a genetic condition may not warrant a schedule of medical treatment for the condition. However, goats were observed limping due to overgrown hooves that needed medical attention. Tri-State and Mr. Candy did not have a plan for routine hoof care, and Mr. Candy admitted that the condition needed attention, as he called Tri-State's veterinarian, who treated the goats (Tr. at 281). The September 7, 2006, August 3, 2009, and November 20, 2009, failures to follow a plan of veterinary care constitute violations of 9 C.F.R. § 2.40.

9. Failure to Retain Records

The Regulations require exhibitors to make, keep, and maintain records, as follows:

§ 2.75 Records: Dealers and exhibitors.

....

(b)(1) Every . . . exhibitor shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning animals other than dogs and cats, purchased or otherwise acquired, owned, held, leased, or otherwise in his or her possession or under his or her control, or which is transported, sold, euthanized, or otherwise disposed of by that . . . exhibitor. The records shall include any offspring born of any animal while in his or her possession or under his or her control.

(i) The name and address of the person from whom the animals were purchased or otherwise acquired;

(ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;

(iii) The vehicle license number and State, and the driver's license number (or photographic identification card for nondrivers issued by a State) and State of the person, if he or she is not licensed or registered under the Act;

(iv) The name and address of the person to whom an animal was sold or given;

(v) The date of purchase, acquisition, sale, or disposal of the animal(s);

(vi) The species of the animal(s); and

(vii) The number of animals in the shipment.

(2) Record of Animals on Hand (other than dogs and cats) (APHIS Form 7019) and Record of Acquisition, Disposition, or Transport of Animals (other than dogs and cats) (APHIS Form 7020) are forms which may be used by . . . exhibitors to keep and maintain the information required by paragraph (b)(1) of this section concerning animals other than dogs and cats except as provided in § 2.79.

(3) One copy of the record containing the information required by paragraph (b)(1) of this section shall accompany each shipment of any animal(s) other than a dog or cat purchased or otherwise acquired by a[n]

... exhibitor. One copy of the record containing the information required by paragraph (b)(1) of this section shall accompany each shipment of any animal other than a dog or cat sold or otherwise disposed of by a[n] ... exhibitor; *Provided, however*, That information which indicates the source and date of acquisition of any animal other than a dog or cat need not appear on the copy of the record accompanying the shipment. The ... exhibitor shall retain one copy of the record containing the information required by paragraph (b)(1) of this section.

9 C.F.R. § 2.75(b).

Dr. McFadden charged Tri-State and Mr. Candy with failure to maintain records relating to the acquisition and disposal of animals in violation of 9 C.F.R. § 2.75(b) during her September 26, 2007, inspection (CX 7; Tr. at 64). Mr. Candy testified that he now keeps records of all animals (Tr. at 775). The record establishes that on September 26, 2007, Tri-State and Mr. Candy failed to keep complete records relating to the acquisition and disposal of animals in violation of 9 C.F.R. § 2.75(b).

E. Personal Liability of Mr. Candy

Pursuant to the Animal Welfare Act, Mr. Candy, as sole corporate officer and director of Tri-State, is personally liable for his acts, omissions, or failures to act within the scope of his employment or office, and Mr. Candy's acts, omissions, or failures to act are deemed the acts, omissions, or failures of Tri-State. 7 U.S.C. § 2139. See, *In re Coastal Bend Zoological Ass'n*. (Decision as to Robert Brock and Michelle Brock), 67 Agric. Dec. 154, 169-71 (2008). A corporation and the individual who exercised sole control over corporate activities may be jointly sanctioned for violations of the Animal

Welfare Act or the Regulations under 7 U.S.C. § 2149 pursuant to the operation of 7 U.S.C. § 2139. *Wilson v. U.S. Dep't of Agric.*, 61 F.3d 907 (7th Cir. 1995).

F. Remedies

The purpose of assessing penalties is not to punish violators, but to deter violators and others from similar behavior. *In re David M. Zimmerman*, 56 Agric. Dec. 433, 461 (1997). In assessing a civil penalty, the Secretary of Agriculture must give due consideration to the size of the business, the gravity of the violation, the person's good faith, and the history of previous violations (7 U.S.C. § 2149(b)). The recommendations of administrative officials responsible for enforcing a statute are entitled to great weight, but are not controlling, and the sanction imposed may be considerably less than, or different from, that recommended. *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 283 (1998).

As Eastern Regional Director of the Animal Care Program for the Animal and Plant Health Inspection Service, Dr. Goldentyer is familiar with the Animal Welfare Act licensees within her jurisdiction (Tr. at 858-60). When considering whether a civil penalty is appropriate, she considers factors such as the size of the business of the licensee, the history of compliance, and the good faith of the enterprise (Tr. at 860-62). Tri-State and Mr. Candy's operation is relatively small. Tri-State and Mr. Candy consented to the payment of a civil penalty in a previous Animal Welfare Act enforcement action (Tr. at 860-61). Dr. Goldentyer could not say that Tri-State and

Mr. Candy acted entirely in good faith because they repeatedly violated the Regulations (Tr. at 861-62).

Dr. Goldentyer agreed that some of the violations were not egregious, but she pointed to the accumulation of violations, which she inferentially attributed to poor management (Tr. at 863). She believed that a period of suspension was appropriate to allow the facility to come into compliance (Tr. at 863-64). She also believed that a civil money penalty would send an appropriate deterrent message (Tr. at 870-71).

Tri-State and Mr. Candy handled animals in a manner that posed a risk of harm to the animals and the public. Tri-State and Mr. Candy do not employ an adequate number of trained personnel to ensure compliance with the Animal Welfare Act and the Regulations, leading to repeated violations pertaining to the maintenance of the facility. Tri-State and Mr. Candy failed to develop and follow a plan for veterinary care of their goats' hooves. Tri-State and Mr. Candy's lion enclosure did not meet standards for structural soundness. Tri-State and Mr. Candy repeatedly violated recordkeeping requirements. Although Tri-State and Mr. Candy corrected many of the conditions for which they were cited, conditions remained unaltered when Mr. Candy disagreed with the Animal and Plant Health Inspection Service's findings. Tri-State and Mr. Candy's response to repeatedly being cited for certain conditions suggests lack of good faith and demonstrates willful violation of the Animal Welfare Act and the Regulations.

The Animal and Plant Health Inspection Service has recommended that Tri-State's Animal Welfare Act license be suspended for a period of 6 months. I find that recommendation overly harsh, considering that many of the conditions on which violations were based have been corrected by Tri-State and Mr. Candy. Considering the remedial nature of the Animal Welfare Act and the fact that no violations resulted in harm to the animals or to the public, I find a 45-day suspension of Tri-State's Animal Welfare Act license and a cease and desist order should be sufficient to deter Tri-State, Mr. Candy, and others from future violations of the Animal Welfare Act and the Regulations.

G. Findings of Fact

1. Tri-State Zoological Park of Western Maryland, Inc., is a Maryland corporation.
2. At all times relevant to this proceeding, Robert L. Candy was the registered agent for Tri-State and the chief executive officer, director, and principal of Tri-State.
3. At all times relevant to this proceeding, Tri-State and Mr. Candy operated a zoo and exhibited approximately 65 wild and exotic animals at a facility in Cumberland, Maryland, under Animal Welfare Act license number 51-C-0064.
4. The Animal and Plant Health Inspection Service conducted inspections of Tri-State and Mr. Candy's facility, records, and animals on May 17, 2006, September 7, 2006, November 29, 2006, May 23, 2007, September 26, 2007, June 2, 2008,

September 3, 2008, August 3, 2009, September 30, 2009, November 20, 2009, May 19, 2010, and September 29, 2010.

5. During each of the inspections identified in Finding of Fact number 4, Animal and Plant Health Inspection Service inspectors cited Tri-State and Mr. Candy for violations of the Regulations.

6. On or about May 17, 2006, Tri-State and Mr. Candy's lion enclosure had rusty support posts and wire twists and had unattached panels that allowed gaps between the ground and the enclosure.

7. On or about May 17, 2006, Tri-State and Mr. Candy's fennec fox and agouti enclosures contained an accumulation of bedding and rodent feces.

8. On or about May 17, 2006, Tri-State and Mr. Candy's binturong enclosure contained visible evidence of rodents.

9. On or about May 17, 2006, Tri-State and Mr. Candy failed to have a sufficient number of adequately trained employees.

10. On or about September 7, 2006, Tri-State and Mr. Candy failed to have an attending veterinarian provide adequate veterinary care to their animals and failed to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries. Specifically, Tri-State and Mr. Candy failed to have a goat's hooves trimmed and failed

to establish and maintain a regular schedule for trimming the goat's hooves in order to ensure the goat's health and well-being and to prevent disease and injury to the goat.

11. On or about September 7, 2006, Tri-State and Mr. Candy failed to enclose a facility for servals with a perimeter fence.

12. On or about November 29, 2006, Tri-State and Mr. Candy's llama and goat enclosure was in disrepair with wire fencing detached from the ground and sharp wire protruding into the enclosure.

13. On or about November 29, 2006, Tri-State and Mr. Candy failed to provide adequate shelter from inclement weather for an arctic fox.

14. On or about November 29, 2006, Tri-State and Mr. Candy's bobcat, lion, tiger, and llama enclosures contained excessive accumulations of feces and food waste and Tri-State and Mr. Candy's standard practice of removal of waste one time per week was inadequate to prevent contamination, minimize disease hazards, and reduce odors.

15. On or about May 23, 2007, Tri-State and Mr. Candy's llama and goat enclosure was in disrepair with wire fencing that was detached from the ground and sharp wire protruding into the enclosure.

16. On or about May 23, 2007, Tri-State and Mr. Candy's tiger enclosure contained an accumulation of excreta, dirt, and hair.

17. On or about May 23, 2007, Tri-State and Mr. Candy failed to establish and maintain an effective pest control program.

18. On or about September 26, 2007, Tri-State and Mr. Candy failed to keep, make, and maintain records regarding the acquisition of a ferret and a chinchilla and failed to keep, make, and maintain records regarding the disposition of a squirrel monkey and a goat.

19. On or about September 26, 2007, Tri-State and Mr. Candy's tiger enclosure was in disrepair. Specifically, the entrance door of the tiger enclosure was constructed of treated wood and small gauge wire and not of sufficient strength to contain the tiger in the enclosure.

20. On or about September 26, 2007, Tri-State and Mr. Candy failed to enclose the housing facility for a tiger with an adequate perimeter fence.

21. On or about June 2, 2008, Tri-State and Mr. Candy failed to have a written program of veterinary care.

22. On or about June 2, 2008, Tri-State and Mr. Candy failed to handle tigers and a lion during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the felids and the general viewing public so as to assure the safety of the animals and the public.

23. On or about June 2, 2008, Tri-State and Mr. Candy's enclosure housing two adult tigers contained a small pool containing excessive urine and feces which attracted pests.

24. On or about September 3, 2008, Tri-State and Mr. Candy failed to have a written program of veterinary care.

25. On or about August 3, 2009, Tri-State and Mr. Candy failed to have an attending veterinarian provide adequate veterinary care to their animals and failed to establish and maintain programs of adequate veterinary care that included daily observation and communication with an attending veterinarian. Specifically, Tri-State and Mr. Candy failed to have two goats with visible gait deficits seen by their attending veterinarian and failed to observe and record animal health problems and to communicate those problems to an attending veterinarian.

26. On or about August 3, 2009, Tri-State and Mr. Candy's lion enclosure was in disrepair. Specifically, the fence was not constructed in a manner that would contain the lion in the enclosure.

27. On or about August 3, 2009, Tri-State and Mr. Candy's enclosure housing two adult tigers contained a small pool containing excessive urine and feces.

28. On or about August 3, 2009, Tri-State and Mr. Candy failed to enclose the housing facility for a lion with an adequate perimeter fence.

29. On or about August 3, 2009, Tri-State and Mr. Candy's enclosures for cougars, servals, bobcats, pigs, and goats contained an excessive amount of feces.

30. On or about September 30, 2009, Tri-State and Mr. Candy's lion enclosure was in disrepair.

31. On or about November 20, 2009, Tri-State and Mr. Candy failed to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries. Specifically, Tri-State and Mr. Candy failed to keep records of hoof care for goats and could not confirm either a schedule for, or the frequency of, hoof trimming.

32. On or about November 20, 2009, Tri-State and Mr. Candy's lion enclosure was in disrepair.

33. On or about May 19, 2010, Tri-State and Mr. Candy's lion enclosure was in disrepair.

34. On or about May 19, 2010, Tri-State and Mr. Candy's enclosure for a young tiger was not constructed in a manner sufficient to contain the tiger.

35. On or about September 29, 2010, Tri-State and Mr. Candy failed to handle a squirrel monkey during public exhibition so there was minimal risk of harm to the squirrel monkey and to the public, with sufficient distance and/or barriers between the squirrel monkey and the general viewing public so as to assure the safety of the squirrel monkey and the public. Specifically, openings in the entry door of the squirrel monkey's enclosure permitted contact between the squirrel monkey and the public.

36. On or about September 29, 2010, Tri-State and Mr. Candy's lion enclosure was in disrepair.

37. On or about September 29, 2010, Tri-State and Mr. Candy failed to establish and maintain an effective pest control program. Specifically, evidence of rodents was observed in the lemur enclosure.

H. Conclusions of Law

1. The Secretary of Agriculture has jurisdiction over this matter.
2. At all times relevant to this proceeding, Tri-State was an “exhibitor” as that term is defined in the Animal Welfare Act and the Regulations.
3. At all times relevant to this proceeding, in his capacity as corporate officer and director of Tri-State, Mr. Candy operated as an “exhibitor” as that term is defined in the Animal Welfare Act and the Regulations.
4. Pursuant to 7 U.S.C. § 2139, Mr. Candy’s acts, omissions, or failures in his capacity as corporate officer and director of Tri-State are deemed to be his own as well as those of the corporate entity, Tri-State.
5. The following violations alleged in the Complaint to have been committed by Tri-State and Mr. Candy are dismissed for lack of proof by a preponderance of the evidence:
 - a. A violation of 9 C.F.R. § 2.40(b)(1)-(2), alleged to have occurred on or about September 26, 2007;
 - b. Violations of 9 C.F.R. § 2.131(c), alleged to have occurred on or about May 17, 2006, on or about June 2, 2008, and on or about August 3, 2009;

c. A violation of 9 C.F.R. § 3.75(a), alleged to have occurred on or about November 29, 2006;

d. A violation of 9 C.F.R. § 3.77(d), alleged to have occurred on or about November 29, 2006;

e. Violations of 9 C.F.R. § 3.81(b) and (c)(4), alleged to have occurred on or about May 17, 2006, on or about August 3, 2009, and on or about September 30, 2009;

f. Violations of 9 C.F.R. § 3.125(a), alleged to have occurred with respect to a cougar enclosure on or about September 26, 2007, with respect to the cougar and bobcat enclosures on or about September 30, 2009, and with respect to the Siberian tiger and white tiger enclosures on or about September 29, 2010;

g. A violation of 9 C.F.R. § 3.125(c), alleged to have occurred on or about September 3, 2008;

h. Violations of 9 C.F.R. § 3.125(d), alleged to have occurred on or about September 30, 2009, and on or about November 20, 2009;

i A violation of 9 C.F.R. §§ 3.125(d) and 3.129, alleged to have occurred on or about June 2, 2008;

j A violation of 9 C.F.R. § 3.127(a) and (b), alleged to have occurred on or about June 2, 2008;

k. A violation of 9 C.F.R. § 3.127(c), alleged to have occurred on or about May 17, 2006;

l. A violation of 9 C.F.R. § 3.129(a), alleged to have occurred on or about September 3, 2008;

m. A violation of 9 C.F.R. § 3.130, alleged to have occurred on or about November 20, 2009;

n. Violations of 9 C.F.R. § 3.131(c), alleged to have occurred on or about June 2, 2008, and on or about August 3, 2009; and

o. A violation of 9 C.F.R. § 3.131(d), alleged to have occurred on or about June 2, 2008.

6. The following violations alleged in the Complaint to have been committed by Tri-State and Mr. Candy are established by a preponderance of the evidence:

a. On or about May 17, 2006, Tri-State and Mr. Candy's lion enclosure had rusty support posts and wire twists and had unattached panels that allowed gaps between the ground and the enclosure, in willful violation of 9 C.F.R. § 3.125(a);

b. On or about May 17, 2006, Tri-State and Mr. Candy's fennec fox and agouti enclosures contained an accumulation of bedding and rodent feces, in willful violation of 9 C.F.R. § 3.125(d);

c. On or about May 17, 2006, Tri-State and Mr. Candy failed to maintain a safe and effective pest control program for the control of mammalian pests, in willful violation of 9 C.F.R. § 3.131(d);

d. On or about May 17, 2006, Tri-State and Mr. Candy failed to have a sufficient number of adequately trained employees, in willful violation of 9 C.F.R. § 3.132;

e. On or about September 7, 2006, Tri-State and Mr. Candy failed to have an attending veterinarian provide adequate veterinary care to their animals and failed to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, in willful violation of 9 C.F.R. § 2.40(a) and (b)(2);

f. On or about September 7, 2006, Tri-State and Mr. Candy failed to enclose a facility for servals with a perimeter fence, in willful violation of 9 C.F.R. § 3.127(d);

g. On or about November 29, 2006, Tri-State and Mr. Candy's llama and goat enclosure was in disrepair with wire fencing detached from the ground and sharp wire protruding into the enclosure, in willful violation of 9 C.F.R. § 3.125(a);

h. On or about November 29, 2006, Tri-State and Mr. Candy failed to provide adequate shelter from inclement weather for an arctic fox, in willful violation of 9 C.F.R. § 3.127(b);

- i. On or about November 29, 2006, Tri-State and Mr. Candy's bobcat, lion, tiger, and llama enclosures contained excessive accumulations of feces and food waste and Tri-State and Mr. Candy's standard practice of removal of waste one time per week was inadequate to prevent contamination, minimize disease hazards, and reduce odors, in willful violation of 9 C.F.R. § 3.131(a);
- j. On or about May 23, 2007, Tri-State and Mr. Candy's llama and goat enclosure was in disrepair with wire fencing that was detached from the ground and sharp wire protruding into the enclosure, in willful violation of 9 C.F.R. § 3.125(a);
- k. On or about May 23, 2007, Tri-State and Mr. Candy's tiger enclosure contained an accumulation of excreta, dirt, and hair, in willful violation of 9 C.F.R. § 3.131(a) and (c);
- l. On or about May 23, 2007, Tri-State and Mr. Candy failed to establish and maintain an effective pest control program, in willful violation of 9 C.F.R. § 3.131(d);
- m. On or about September 26, 2007, Tri-State and Mr. Candy failed to keep, make, and maintain records regarding the acquisition of a ferret and a chinchilla and failed to keep, make, and maintain records regarding the disposition of a squirrel monkey and a goat, in willful violation of 9 C.F.R. § 2.75(b);
- n. On or about September 26, 2007, Tri-State and Mr. Candy's lion enclosure was in disrepair, in willful violation of 9 C.F.R. § 3.125(a);

o. On or about September 26, 2007, Tri-State and Mr. Candy failed to enclose the housing facility for a tiger with an adequate perimeter fence, in willful violation of 9 C.F.R. § 3.127(d);

p. On or about June 2, 2008, Tri-State and Mr. Candy failed to have a written program of veterinary care, in willful violation of 9 C.F.R. § 2.40(a);

q. On or about June 2, 2008, Tri-State and Mr. Candy failed to handle tigers and a lion during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the felids and the general viewing public so as to assure the safety of the animals and the public, in willful violation of 9 C.F.R. § 2.131(c)(1);

r. On or about June 2, 2008, Tri-State and Mr. Candy's enclosure housing two adult tigers contained a small pool containing excessive urine and feces which attracted pests, in willful violation of 9 C.F.R. § 3.125(d);

s. On or about September 3, 2008, Tri-State and Mr. Candy failed to have a written program of veterinary care, in willful violation of 9 C.F.R. § 2.40(a);

t. On or about August 3, 2009, Tri-State and Mr. Candy failed to have an attending veterinarian provide adequate veterinary care to their animals and failed to establish a program of adequate veterinary care that included daily observation and communication with an attending veterinarian, in willful violation of 9 C.F.R. § 2.40(a) and (b)(3);

u. On or about August 3, 2009, Tri-State and Mr. Candy's lion enclosure was in disrepair, in willful violation of 9 C.F.R. § 3.125(a);

v. On or about August 3, 2009, Tri-State and Mr. Candy's enclosure housing two adult tigers contained a small pool containing excessive urine and feces, in willful violation of 9 C.F.R. § 3.125(d);

w. On or about August 3, 2009, Tri-State and Mr. Candy failed to enclose the housing facility for a lion with an adequate perimeter fence, in willful violation of 9 C.F.R. § 3.127(d);

x. On or about August 3, 2009, Tri-State and Mr. Candy's enclosures for cougars, servals, bobcats, pigs, and goats contained an excessive amount of feces, in willful violation of 9 C.F.R. § 3.131(a);

y. On or about September 30, 2009, Tri-State and Mr. Candy's lion enclosure was in disrepair, in willful violation of 9 C.F.R. § 3.125(a);

z. On or about November 20, 2009, Tri-State and Mr. Candy failed to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, in willful violation of 9 C.F.R. § 2.40(b)(2);

aa. On or about November 20, 2009, Tri-State and Mr. Candy's lion enclosure was in disrepair, in willful violation of 9 C.F.R. § 3.125(a);

bb. On or about May 19, 2010, Tri-State and Mr. Candy's lion enclosure was in disrepair, in willful violation of 9 C.F.R. § 3.125(a);

cc. On or about May 19, 2010, Tri-State and Mr. Candy's enclosure for a young tiger was not constructed in a manner sufficient to contain the tiger, in willful violation of 9 C.F.R. § 3.125(a);

dd. On or about September 29, 2010, Tri-State and Mr. Candy failed to handle a squirrel monkey during public exhibition so there was minimal risk of harm to the squirrel monkey and to the public, with sufficient distance and/or barriers between the squirrel monkey and the general viewing public so as to assure the safety of the squirrel monkey and the public, in willful violation of 9 C.F.R. § 2.131(c);

ee. On or about September 29, 2010, Tri-State and Mr. Candy's lion enclosure was in disrepair, in willful violation of 9 C.F.R. § 3.125(a); and

ff. On or about September 29, 2010, Tri-State and Mr. Candy failed to establish and maintain an effective pest control program, in willful violation of 9 C.F.R. § 3.84(d).

7. The suspension of Tri-State's Animal Welfare Act license for a period of 45 days is appropriate.

8. An order instructing Tri-State and Mr. Candy to cease and desist from violations of the Animal Welfare Act and the Regulations is appropriate.

I. Tri-State and Mr. Candy's Request for Oral Argument

Tri-State and Mr. Candy's request for oral argument, which the Judicial Officer may grant, refuse, or limit,³ is refused because the issues are not complex and oral argument would serve no useful purpose.

J. Tri-State and Mr. Candy's Appeal Petition

Tri-State and Mr. Candy raise seven issues in their Appeal to Judicial Officer. First, Tri-State and Mr. Candy assert the Administrator failed to meet his burden of proof that Tri-State and Mr. Candy willfully violated the Regulations.

As the proponent of an order, the Administrator has the burden of proof in this proceeding,⁴ and the standard of proof by which the burden of persuasion is met in an administrative proceeding conducted under the Animal Welfare Act is preponderance of the evidence.⁵ After a thorough review of the record, I affirm the ALJ's conclusions

³7 C.F.R. § 1.145(d).

⁴5 U.S.C. § 556(d).

⁵*Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981); *In re Lorenza Pearson*, 68 Agric. Dec. 685, 727-28 (2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011); *In re Jerome Schmidt*, 66 Agric. Dec. 159, 178 (2007); *In re The Int'l Siberian Tiger Found.* (Decision as to The International Siberian Tiger Foundation, Diana Cziraky, The Siberian Tiger Foundation, and Tiger Lady), 61 Agric. Dec. 53, 79 n.3 (2002); *In re Reginald Dwight Parr* (Order Denying Respondent's Pet. for Recons.), 59 Agric. Dec. 629, 643-44 n.8 (2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1455-56 n.7 (1997), *aff'd*, 173 F.3d 422 (Table) (3d Cir. 1998), *printed in* 57 Agric. Dec. 869 (1998); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 461 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table), *printed in* 57 Agric. Dec. 46 (1998); *In re Zoological* (continued...)

regarding the allegations in the Complaint which the Administrator proved by a preponderance of the evidence, and I adopt the ALJ's findings of fact and conclusions of law with only minor modifications. Tri-State and Mr. Candy's contentions that the ALJ's conclusions of law are error, have no merit.

Second, Tri-State and Mr. Candy assert they corrected their violations of the Regulations thereby barring the Administrator from instituting this proceeding.

Each Animal Welfare Act licensee must always be in compliance in all respects with the Animal Welfare Act and the Regulations. While Tri-State and Mr. Candy's corrections of their Animal Welfare Act violations are commendable and can be taken into account when determining the sanction to be imposed, Tri-State and Mr. Candy's corrections of their violations do not eliminate the fact that the violations occurred,⁶ and the Administrator is not barred from instituting a proceeding for violations of the Animal Welfare Act and the Regulations after the violations have been corrected.

Third, Tri-State and Mr. Candy contend the Administrator filed the Complaint in violation of rules, regulations, and procedural mandates dictated by the "USDA guide

⁵(...continued)

Consortium of Maryland, Inc., 47 Agric. Dec. 1276, 1283-84 (1988).

⁶*In re Lorenza Pearson*, 68 Agric. Dec. 685, 727-28 (2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011); *In re Jewel Bond*, 65 Agric. Dec. 92, 109 (2006), *aff'd per curiam*, 275 F. App'x 547 (8th Cir. 2008); *In re Eric John Drogosch*, 63 Agric. Dec. 623, 643 (2004); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 644 (2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); *In re Susan DeFrancesco*, 59 Agric. Dec. 97, 112 n.12 (2000); *In re Michael A. Huchital*, 58 Agric. Dec. 763, 805 n.6 (1999); *In re James E. Stephens*, 58 Agric. Dec. 149, 184-85 (1999).

book.” Specifically, Tri-State and Mr. Candy assert the United States Department of Agriculture inspector did not first recommend that the Administrator institute this proceeding and the Administrator did not conduct an investigation prior to filing the Complaint.

The Rules of Practice provide that the Administrator may file a complaint alleging a violation of the Animal Welfare Act or the Regulations based upon reason to believe that a person has violated the Animal Welfare Act or the Regulations, as follows:

§ 1.133 Institution of proceedings.

....

(b) *Filing of complaint or petition for review.* (1) If there is reason to believe that a person has violated or is violating any provision of a statute listed in § 1.131 or of any regulation, standard, instruction or order issued pursuant thereto, whether based upon information furnished under paragraph (a) of this section or other information, a complaint may be filed with the Hearing Clerk pursuant to these rules.

7 C.F.R. § 1.133(b)(1). The Rules of Practice do not require that the Administrator receive a recommendation that he institute a proceeding from a United States Department of Agriculture inspector prior to filing a complaint alleging violations of the Animal Welfare Act or the Regulations, and the Administrator is not required to conduct an investigation prior to filing a complaint pursuant to 7 C.F.R. § 1.133(b)(1).⁷

Fourth, Tri-State and Mr. Candy assert the Regulations are void for vagueness.

⁷*In re Kathy Jo Bauck*, 68 Agric. Dec. 853, 859 (2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010).

A regulation is unconstitutionally vague if the regulation is so unclear that ordinary people cannot understand what conduct is prohibited or required or that it encourages arbitrary and discriminatory enforcement.⁸ A review of each of the Regulations which Tri-State and Mr. Candy is alleged to have violated reveals none which is unconstitutionally vague. The difficulty arises in defining certain regulatory terms, such as “adequate veterinary care” found in 9 C.F.R. § 2.40(a) and applying those terms to the facts of a given situation. However, regulations are not unconstitutionally vague merely because they are ambiguous or difficulty is found in determining whether marginal cases fall within their language.⁹

Fifth, Tri-State and Mr. Candy contend the Administrator failed to provide them with adequate notice and an opportunity to correct in accordance with 5 U.S.C. § 558(c).

The Administrative Procedure Act provides, before institution of agency proceedings for suspension of a license, the licensee must be given notice of facts warranting suspension and an opportunity to achieve compliance, except in cases of willfulness, as follows:

⁸*Thomas v. Hinson*, 74 F.3d 888, 889 (8th Cir. 1996); *Georgia Pacific Corp. v. Occupational Safety & Health Review Comm’n*, 25 F.3d 999, 1004-05 (11th Cir. 1994); *Throckmorton v. NTSB*, 963 F.2d 441, 444 (D.C. Cir. 1992); *The Great American Houseboat Co. v. United States*, 780 F.2d 741, 746 (9th Cir. 1986); *United States v. Sun & Sand Imports, Ltd.*, 725 F.2d 184, 187 (2d Cir. 1984).

⁹*Great American Houseboat Co. v. United States*, 780 F.2d 741, 747 (9th Cir. 1986); *United States v. Sun & Sand Imports, Ltd.*, 725 F.2d 184, 187 (2d Cir. 1984).

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....

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

- (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
- (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

5 U.S.C. § 558(c). Tri-State and Mr. Candy's violations of the Regulations were willful;¹⁰ therefore, suspension of Tri-State's Animal Welfare Act license falls within the Administrative Procedure Act's "willfulness" exception to the notice and opportunity to demonstrate or achieve compliance requirement.

Sixth, Tri-State and Mr. Candy contend Dr. McFadden did not retain documents beyond 3 years, but the Complaint alleges violations beginning in 2006.

¹⁰A willful act is an act in which the violator intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements. *In re Jeffrey W. Ash*, ___ Agric. Dec. ___, slip op. at 16-17 (Sept. 14, 2012); *In re Kathy Jo Bauck*, 68 Agric. Dec. 853, 860-61 (2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010); *In re D&H Pet Farms, Inc.*, 68 Agric. Dec. 798, 812-13 (2009); *In re Jewel Bond*, 65 Agric. Dec. 92, 107 (2006), *aff'd per curiam*, 275 F. App'x 547 (8th Cir. 2008); *In re James E. Stephens*, 58 Agric. Dec. 149, 180 (1999); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 306 (1978), *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978).

The ALJ's conclusions that Tri-State and Mr. Candy violated the Regulations are fully supported by witness testimony and documentary evidence introduced by the Administrator. Therefore, I find Dr. McFadden's failure to retain a copy of documents which she prepared for more than 3 years (Tr. at 218) is not relevant to this proceeding.

Seventh, Tri-State and Mr. Candy contend Dr. McFadden did not note corrections of violations on her inspection reports.

Dr. McFadden testified that, when she finds that an Animal Welfare Act licensee has corrected a previously cited violation, she does not note the correction on her inspection report (Tr. at 223). Dr. McFadden testified, if a previously cited violation does not appear on the next subsequent inspection report, a person reviewing that subsequent inspection report can assume that the previous violation has been corrected "because each report represents what [she is] observing at that time." (Tr. at 224.) The ALJ's conclusions that Tri-State and Mr. Candy violated the Regulations are all based upon violations cited on inspection reports. The ALJ did not assume that a violation cited on one inspection report continued until an inspector noted on a subsequent inspection report that the previously cited violation had been corrected. Therefore, I find that Dr. McFadden's failure to note corrections on inspection reports is not relevant to this proceeding.

For the foregoing reasons, the following Order is issued.

ORDER


1. Tri-State Zoological Park of Western Maryland, Inc., and its agents, employees, successors, and assigns, directly or indirectly through any corporate or other device, including, but not limited to, Robert L. Candy, are ordered to cease and desist from violations of the Animal Welfare Act and the Regulations. Paragraph 1 of this Order shall become effective upon service of this Order on Tri-State and Mr. Candy.

2. Animal Welfare Act license number 51-C-0064 is suspended for a period of 45 days. Paragraph 2 of this Order shall become effective 60 days after service of this Order on Tri-State and Mr. Candy.

RIGHT TO JUDICIAL REVIEW

Tri-State and Mr. Candy have the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Tri-State and Mr. Candy must seek judicial review within 60 days after entry of the Order in this Decision and Order.¹¹ The date of entry of the Order in this Decision and Order is March 22, 2013.

Done at Washington, DC
March 22, 2013



William G. Jenson
Judicial Officer

¹¹7 U.S.C. § 2149(c).